

UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF CALIFORNIA

JESUS DIAZ,

Plaintiff,

v.

K. BOTMI, et al.,

Defendants.

No. 2:24-cv-1417 DAD AC P

ORDER

Plaintiff, a state prisoner proceeding pro se, seeks relief pursuant to 42 U.S.C. § 1983 and has requested leave to proceed in forma pauperis pursuant to 28 U.S.C. § 1915.

I. Application to Proceed In Forma Pauperis

Plaintiff has submitted a declaration that makes the showing required by 28 U.S.C. § 1915(a). ECF Nos. 2, 4. Accordingly, the request to proceed in forma pauperis will be granted.

Plaintiff is required to pay the statutory filing fee of \$350.00 for this action. 28 U.S.C. §§ 1914(a), 1915(b)(1). By this order, plaintiff will be assessed an initial partial filing fee in accordance with the provisions of 28 U.S.C. § 1915(b)(1). By separate order, the court will direct the appropriate agency to collect the initial partial filing fee from plaintiff's trust account and forward it to the Clerk of the Court. Thereafter, plaintiff will be obligated for monthly payments of twenty percent of the preceding month's income credited to plaintiff's prison trust account. These payments will be forwarded by the appropriate agency to the Clerk of the Court each time

the amount in plaintiff's account exceeds \$10.00, until the filing fee is paid in full. 28 U.S.C. § 1915(b)(2).

## II. Complaint

### A. Statutory Screening of Prisoner Complaints

The court is required to screen complaints brought by prisoners seeking relief against “a governmental entity or officer or employee of a governmental entity.” 28 U.S.C. § 1915A(a). The court must dismiss a complaint or portion thereof if the prisoner has raised claims that are “frivolous, malicious, or fail[] to state a claim upon which relief may be granted,” or that “seek[] monetary relief from a defendant who is immune from such relief.” 28 U.S.C. § 1915A(b).

A claim “is [legally] frivolous where it lacks an arguable basis either in law or in fact.” Neitzke v. Williams, 490 U.S. 319, 325 (1989); Franklin v. Murphy, 745 F.2d 1221, 1227-28 (9th Cir. 1984). “[A] judge may dismiss . . . claims which are ‘based on indisputably meritless legal theories’ or whose ‘factual contentions are clearly baseless.’” Jackson v. Arizona, 885 F.2d 639, 640 (9th Cir. 1989) (quoting Neitzke, 490 U.S. at 327), superseded by statute on other grounds as stated in Lopez v. Smith, 203 F.3d 1122, 1130 (9th Cir. 2000). The critical inquiry is whether a constitutional claim, however inartfully pleaded, has an arguable legal and factual basis. Franklin, 745 F.2d at 1227-28 (citations omitted).

“Federal Rule of Civil Procedure 8(a)(2) requires only ‘a short and plain statement of the claim showing that the pleader is entitled to relief,’ in order to ‘give the defendant fair notice of what the . . . claim is and the grounds upon which it rests.’” Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007) (alteration in original) (quoting Conley v. Gibson, 355 U.S. 41, 47 (1957)). “Failure to state a claim under § 1915A incorporates the familiar standard applied in the context of failure to state a claim under Federal Rule of Civil Procedure 12(b)(6).” Wilhelm v. Rotman, 680 F.3d 1113, 1121 (9th Cir. 2012) (citations omitted). In order to survive dismissal for failure to state a claim, a complaint must contain more than “a formulaic recitation of the elements of a cause of action;” it must contain factual allegations sufficient “to raise a right to relief above the speculative level.” Twombly, 550 U.S. at 555 (citations omitted). “[T]he pleading must contain something more . . . than . . . a statement of facts that merely creates a suspicion [of] a legally

cognizable right of action.” Id. (alteration in original) (quoting 5 Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 1216 (3d ed. 2004)).

“[A] complaint must contain sufficient factual matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’” Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (quoting Twombly, 550 U.S. at 570). “A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” Id. (citing Twombly, 550 U.S. at 556). In reviewing a complaint under this standard, the court must accept as true the allegations of the complaint in question, Hosp. Bldg. Co. v. Trs. of the Rex Hosp., 425 U.S. 738, 740 (1976) (citation omitted), as well as construe the pleading in the light most favorable to the plaintiff and resolve all doubts in the plaintiff’s favor, Jenkins v. McKeithen, 395 U.S. 411, 421 (1969) (citations omitted).

#### B. Complaint

The complaint alleges that defendants Botmi and Villanueva violated plaintiff’s First and Eighth Amendment rights when they retaliated against him by denying him outdoor exercise on October 13, 21, 27, and 28, 2023, and then falsified records to say that he either refused or was given yard time on those days. ECF No. 1 at 3-4.

#### C. Failure to State a Claim

##### i. Outdoor Exercise

In the prison context, exercise is “one of the basic human necessities protected by the Eighth Amendment.” LeMaire v. Maass, 12 F.3d 1444, 1457 (9th Cir. 1993). However, “a temporary denial of outdoor exercise with no medical effects is not a substantial deprivation.” May v. Baldwin, 109 F.3d 557, 565 (9th Cir. 1997). Plaintiff’s allegation that he was denied outdoor exercise on four separate occasions in October 2023, without indication that he suffered any medical effects, therefore fails to state a claim for relief.

##### ii. Retaliation

In order to state a claim for retaliation, plaintiff must allege facts showing that defendants took adverse action against him and that they were motivated to do so by plaintiff’s protected conduct. Rhodes v. Robinson, 408 F.3d 559, 567 (9th Cir. 2005) (citation omitted). Plaintiff

1 makes only a conclusory allegation that defendants denied him outdoor exercise because of  
 2 another lawsuit he filed. There are no facts demonstrating that the denials were motivated by  
 3 plaintiff's other lawsuit. Plaintiff has therefore failed to state a claim for retaliation against any  
 4 defendant.

#### 5 D. Leave to Amend

6 The complaint does not state any cognizable claims for relief and plaintiff will be given an  
 7 opportunity to file an amended complaint. If plaintiff chooses to file a first amended complaint,  
 8 he must demonstrate how the conditions about which he complains resulted in a deprivation of his  
 9 constitutional rights. Rizzo v. Goode, 423 U.S. 362, 370-71 (1976). Also, the complaint must  
 10 allege in specific terms how each named defendant is involved. Arnold v. Int'l Bus. Machs.  
 11 Corp., 637 F.2d 1350, 1355 (9th Cir. 1981). There can be no liability under 42 U.S.C. § 1983  
 12 unless there is some affirmative link or connection between a defendant's actions and the claimed  
 13 deprivation. Id.; Johnson v. Duffy, 588 F.2d 740, 743 (9th Cir. 1978). Furthermore, "[v]ague and  
 14 conclusory allegations of official participation in civil rights violations are not sufficient." Ivey v.  
 15 Bd. of Regents, 673 F.2d 266, 268 (9th Cir. 1982) (citations omitted).

16 Plaintiff is also informed that the court cannot refer to a prior pleading in order to make  
 17 his first amended complaint complete. Local Rule 220 requires that an amended complaint be  
 18 complete in itself without reference to any prior pleading. This is because, as a general rule, an  
 19 amended complaint supersedes the original complaint. Loux v. Rhay, 375 F.2d 55, 57 (9th Cir.  
 20 1967) (citations omitted), overruled in part by Lacey v. Maricopa County, 693 F.3d 896, 928 (9th  
 21 Cir. 2012) (claims dismissed with prejudice and without leave to amend do not have to be re-pled  
 22 in subsequent amended complaint to preserve appeal). Once plaintiff files a first amended  
 23 complaint, the original complaint no longer serves any function in the case. Therefore, in an  
 24 amended complaint, as in an original complaint, each claim and the involvement of each  
 25 defendant must be sufficiently alleged.

#### 26 III. Request for a Translator

27 Plaintiff has requested that the court appoint a translator, presumably to assist him in  
 28 interpreting the filings in this action. ECF No. 8. However, "the expenditure of public funds [on

1 behalf of an indigent litigant] is proper only when authorized by Congress,” Tedder v. Odel, 890  
2 F.2d 210, 211 (9th Cir. 1989) (alteration in original) (quoting United States v. MacCollom, 426  
3 U.S. 317, 321 (1976)), and plaintiff has not identified, nor is the court aware of, any authority that  
4 authorizes the appointment of a translator to assist plaintiffs in civil actions. Furthermore, it  
5 appears that plaintiff was able to obtain translation assistance in putting together his complaint,  
6 and there is no indication that he will be unable to continue obtaining translation assistance. The  
7 request for appointment of a translator will therefore be denied.

8 IV. Plain Language Summary of this Order for a Pro Se Litigant

9 Your request to proceed in forma pauperis is granted. That means you do not have to pay  
10 the entire filing fee now. You will pay it over time, out of your trust account.

11 Your complaint will not be served because the facts you alleged are not enough to state a  
12 claim. The denial of outdoor exercise for four days without any claim that it caused you medical  
13 harm does not violate the Eighth Amendment. You also have not included facts showing why  
14 you believe the defendants denied you outdoor exercise *because of* your other lawsuit. You may  
15 amend your complaint to try to fix these problems. Be sure to provide facts that show exactly  
16 what each defendant did to violate your rights or to cause a violation of your rights.

17 If you choose to file a first amended complaint, it must include all claims you want to  
18 bring. Once an amended complaint is filed, the court will not look at any information in the  
19 original complaint. **Any claims and information not in the first amended complaint will not**  
20 **be considered.**

21 In accordance with the above, IT IS HEREBY ORDERED that:

22 1. Plaintiff’s request for leave to proceed in forma pauperis (ECF No. 2) is GRANTED.

23 2. Plaintiff is obligated to pay the statutory filing fee of \$350.00 for this action. Plaintiff  
24 is assessed an initial partial filing fee in accordance with the provisions of 28 U.S.C.  
25 § 1915(b)(1). All fees shall be collected and paid in accordance with this court’s order to the  
26 appropriate agency filed concurrently herewith.

27 3. Plaintiff’s motion for a translator (ECF No. 8) is DENIED.

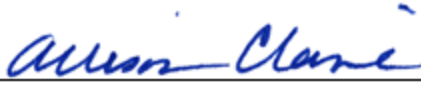
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1           4. Plaintiff's complaint fails to state a claim upon which relief may be granted, see 28  
2 U.S.C. § 1915A, and will not be served.

3           5. Within thirty days from the date of service of this order, plaintiff may file an amended  
4 complaint that complies with the requirements of the Civil Rights Act, the Federal Rules of Civil  
5 Procedure, and the Local Rules of Practice. The amended complaint must bear the docket  
6 number assigned this case and must be labeled "First Amended Complaint." Failure to file an  
7 amended complaint in accordance with this order will result in a recommendation that this action  
8 be dismissed.

9           6. The Clerk of the Court is directed to send plaintiff a copy of the prisoner complaint  
10 form used in this district.

11 DATED: June 7, 2024

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13 ALLISON CLAIRE  
14 UNITED STATES MAGISTRATE JUDGE  
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